

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**CRIMINAL APPEAL No. 328 of 1995**

**For Approval and Signature:**

**HON'BLE MR.JUSTICE S.R.BRAHMBHATT**

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1 Whether Reporters of Local Papers may be  
1 allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the  
3 fair copy of the judgment ?

Whether this case involves a substantial  
4 question of law as to the interpretation  
4 of the constitution of India, 1950 or any  
order made thereunder ?

5 Whether it is to be circulated to the  
5 civil judge ?

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**HARSHESH SOMCHANDBHAI THAKKAR - Appellant(s)**

**Versus**

**NIRMALABEN JASHWANTLAL JOSHI & 1 - Opponent(s)**

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**Appearance :**

MR SUNIL MEHTA FOR AM BUKHARI for Appellant  
NOTICE SERVED BY DS for Respondent No(s).: 1.

MR KC SHAH ADDL PP FOR Respondent No.2

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**CORAM : HON'BLE MR.JUSTICE S.R.BRAHMBHATT**

**Date : 13/07/2005**

**ORAL JUDGMENT**

1. Heard Shri Sunil Mehta, learned advocate for  
Shri A.M. Bukhari, learned advocate for the

appellant and Shri K.C. Shah, learned Addl.P.P. for the respondent No. 2 State. The respondent No. 1 is served. None appears on behalf of respondent No. 1, though served.

2. The appellant has preferred the present acquittal appeal under Section 378 of the Code of Criminal Procedure challenging the order of acquittal dated 14.10.1993 passed by the 3<sup>rd</sup> Joint Civil Judge (C.D.) Judicial Magistrate First Class, Ahmedabad Rural in Criminal Case No. 1722 of 1992 acquitting the respondent No. 1 of the charges under Section 142 of the Negotiable Instrument Act, 1881 (herein after referred as "the act" for short). The appeal has been admitted by this court (Coram: K.J. Vaidya, J.) vide order dated 30<sup>th</sup> March, 1995 and the trial Court was ordered to prepare the paper book and send the same to this court on or before 12.12.1995.

3. Shri Mehta for Shri Bukhari has contended that the learned trial Court has erroneously recorded the acquittal vide order dated 14.10.1993 without appreciating the evidence and law in respect of the case. The present appellant, who is original complainant in Criminal Case No. 1722 of 1992 preferred complaint on 29<sup>th</sup> May, 1992 against present respondent No. 1 alleging that two cheques for

an amount of Rs.29,770=00 and Rs.7254=00 were issued by the respondent against the outstanding payment for material purchased from his firm. The relevant bill is produced on the record. The xerox copy of the two cheques dated 17.12.1991 and 21.1.1992 have also been placed on record. The complainant has averred in his complaint that said two cheques were deposited in his bank account and the bank returned the same with an advice that "referred to drawee/ for non sufficient fund". This advice was on 14<sup>th</sup> March, 1992. Thereafter, the complainant issued notice through his advocate on 30<sup>th</sup> March, 1992 and the complainant kept on requesting opponent for payment of the outstanding dues. Despite repeated requests, as dues were not being paid, the complainant had to visit the place of the opponent No. 1 in person and at that time, he was asked to present those two cheques again with a promise that they would be honoured.

4. Accordingly, the complainant presented those two cheques again in his bank and bank returned the same under advice dated 22.4.1992 that "the account is closed". The complainant has submitted this advice, which was received by him 24.4.1992. Complainant issued notice through his advocate on 6.5.1992, however, the

notice were returned unserved with an endorsement of the postal department "absent". As per the say of the complainant, this intimation was received by the complainant from the postal department on 16<sup>th</sup> May, 1992 and thereafter, he preferred complaint, which came to be numbered as Criminal Case No. 1722 of 1992 on 29<sup>th</sup> May, 1992. In view of the provision of Section 138 of the Act, as it stood then, the complainant was required to issue notice within 15 days from the intimation of the bank that the cheques have been returned for insufficiency of fund or for closing of the account. The complainant has submitted that the bank advice was received only on 24.4.1992, though no proof has been submitted of his receiving the intimation from the Bank on 24.4.1992. The complainant has further submitted that counting 15 days from 24.4.1992, he was required to issue notice on or before 7.5.1992 and accordingly, he issued notice through his advocate on 6<sup>th</sup> May, 1992. The complainant submits that notice could not be served upon the opponent no. 1 despite several attempts made by postal department as it is seen from the endorsement, which is returned to him. The last attempt from the postal department was on 14<sup>th</sup> May, 1992 and thereafter,

the article was returned back to the advocate and the complaint came to be filed on 29<sup>th</sup> May, 1992. In view of this, complaint ought to have been treated in time in view of the provisions of Section 138 and 132 (b) of the Act.

5. Shri Mehta strenuously urged that looking to the averments made in the complaint, the learned Magistrate ought not to have dismissed the complaint relying upon the averments made in the application Ex.9 filed by the opponent for dismissing the complaint. The dates mentioned in the complaint, which have not been controverted effectively by the opponent and merely on application and averments made thereunder Ex.9, the impugned order ought not to have been passed by the learned Magistrate.

6. This court has perused the record and proceedings in detail. It appears that the complainant has failed in establishing the exact date on which the intimation from the Bank came to be received by him in respect of closing of the account. The postal endorsement about absence of the party i.e. respondent No. 1 is also not disputed. The learned advocate has not been in a position to point out that endorsement "absent" made by the postal authority amounts to service of notice. In other words, he is unable to dispute the

proposition of law that when the article is returned by the postal authority with an endorsement that addressee is absent, then, it would not amount to service on the addressee. In view of this proposition, it appears that the notice itself was not served upon the opponent no. 1. The opponent No. 1 in her application at Ex.9 has taken this dispute also that she did not receive the notice in question at all.

7. In view of this facts and circumstances of the case and in view of the established proposition of law that when the notice itself is not served, the complaint was not competent. In view of the aforesaid discussion, this court is not inclined to interfere with the impugned order dated 14.10.1993 passed by the learned 3<sup>rd</sup> Joint Civil Judge (C.D.) & Judicial Magistrate First Class, Ahmedabad Rural in Criminal Case No. 1722 of 1992. In the result, appeal fails and the same is rejected.

**(S.R.BRAHMBHATT, J.)**

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